

Combating Terrorism: EU Proposals

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‘The Implementation of Third Pillar Measures in
the EU Member States: A General Review Pre-
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Multi-sector anti-terrorism policy

- JHA Council 20 September 2001
 - harness measures already adopted at EU level
 - speed up process of creating an area of freedom, security and justice
- European Council 21 September 2001
 - approval plan of action to combat terrorism
 - enhancing police/judicial cooperation
 - developing international legal instruments
 - strengthening air security
 - coordinating the EU’s action: road map

Road map

- General Affairs Council
 - coordination and necessary impetus
 - detailed road map
 - instrument to monitor implementation
 - 63 objectives + indication of means, deadlines, responsibilities, progress made, forthcoming work
 - external relations/foreign affairs
 - regulation on specific restrictive measures directed against certain persons and entities
 - immediate freezing of funds 27 terrorist organisations
 - UN General Convention on International Terrorism
 - signing/ratification UN Financing of Terrorism Convention

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- Transport Council
 - air security
- Ecofin Council (and JHA Council)
 - measures against funding of terrorism
 - measures against NCCT's
 - enlargement FATF action to include measures to combat funding of terrorism
- JHA Council
 - Europol, Eurojust, joint teams, freezing assets, extradition conventions + MLAT's, ...
 - re-establishment internal Schengen border checks
 - criminal law definition terrorism
 - European arrest warrant

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Criminal law definition terrorism

- state of the art
 - UN/ICAO: unlawful seizure of aircraft, unlawful acts against safety of aircraft, unlawful acts of violence at airports, unlawful acts against safety maritime navigation/fixed platforms Continental Shelf, crimes against internationally protected persons, taking of hostages, physical protection nuclear materials, suppression of terrorist bombings, suppression of financing terrorism, ...
 - CoE: 1977 Convention on the Suppression of Terrorism
 - EU: 1996 Extradition Convention, Europol mandated + 'center of excellence' on terrorism, 'normal' approximation process for EU 'core' crimes

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- unprecedented pressure for speedy adoption Commission proposal for framework decision
 - no borders within EU
 - risk for loopholes to be exploited by international terrorist networks
 - only specific anti-terrorism legislation in 6 MS
 - new measures needed
 - for punishing terrorist offences
 - committed with specific terrorist intent
 - defined with reference to national law

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Specific terrorist intent

- i.e. in as far as unlawfully committed with the aim of seriously affecting, in particular by the intimidation of the population, or destroying the political, economic or social structures of a country or of an international organisation
- civil liberties issues
 - ‘affecting’ initially ‘altering’
 - no initial reference to ‘international organisation’ (G8)
 - ‘unlawful’: if not justified by international public law or even national law (unilateral military intervention?)

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Ordinary national law offences

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- murder and homicide; serious bodily injury; kidnapping or hostage taking; extortion; aggravated robbery
- seizure of or serious damage to state or government facilities, means of public transport, infrastructure facilities, places of public use and property
 - could include ‘urban violence’
 - concern about use protests and non-violent actions
- fabrication, possession, acquisition, transport or supply of weapons or explosives; releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment; interfering with or disrupting the supply of water, power or any other fundamental natural resource; interfering with an information system

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... 'terrorist group' related offences

- i.e. structured organisation of more than two persons, established over a period of time, acting in concert to commit terrorist offences
 - added value to 'criminal organisation' concept?
- punishable if committed with 'terrorist intent'
 - directing a terrorist group
 - participating in the activities of a terrorist group
 - supporting a terrorist group, including funding for its activities
 - laundering the proceeds of terrorist or other offences committed as part of a terrorist group

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Minimum maximum penalties

- directing a terrorist group: at least 20 years deprivation of liberty for and of 8
- other offences relating to terrorist groups: 8 years
- other terrorist offences: more severe penalties than those provided for the corresponding ordinary law offences under national law MS, unless already highest penalty level allowed for
- aggravating circumstances
- reduction of penalties

• liability of and sanctions for legal persons

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Excessive compulsory jurisdiction

- national (extraterritorial) jurisdiction for the entire (virtual) territory of the Union and all its nationals, residents, legal persons and institutions
 - supposed to give a new dimension to the concept of the area of freedom, security and justice
 - flagrant violation Article 31, under d TEU: aim is to 'prevent' conflicts of jurisdiction
 - US arrogance in allowing for extraterritorial tribunals
- resolving jurisdiction conflicts and coordination of prosecutions with assistance of Eurojust

Trier, 22 November 2001 **could mutual recognition of decisions to prosecute?**

European arrest warrant

- Commission proposal for framework decision
- likely political agreement/adoption in JHA Council on 6-7 December
- numerous weaknesses
- general comments re choice of the instrument
 - framework decision only to be used for approximation criminal law
 - entire convention-based extradition acquis to be declared non-applicable by ministerial decision?
 - convention required
 - general trend to avoid recourse to conventions

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Terrorism-related aspects

- terrorism issue drastically speedened up EU process
- general abolishment double criminality rule
 - discussion negative/positive list & threshold
 - 1996 EU extradition Convention abolished double criminality for terrorism
- precedence European arrest warrant
 - over extradition request 3rd non-CoE state (such as US)
- denial conceptual link asylum/extradition law
 - asylum: to be granted in case of likely prosecution on discriminatory (inter alia political) grounds
 - extradition: political offence/non-discrimination exception

Political offence exception

- refusal due in case of political(ly) (inspired) offence (e.g. political terrorism)
- official rationale: neutrality, i.e. non-interference in internal political dynamics (establishment vs opposition) requesting state
- non-official message: likeliness extradition requested on political grounds
- evolution (CoE 1977 – EU 1996): exception not be invoked for (criminal organisation or association to commit offences aimed at) terrorist offences

Non-discrimination exception

- refusal due in case of likelihood of prosecution on discriminatory (inter alia political) grounds
- rationale: coherence with Geneva Convention (extradition as opposed to granting asylum or giving shelter)
- Protocol to TEU on asylum for EU nationals
- unilateral Belgian counter-declaration
- 1999 Tampere European Council
- Spanish bilateral initiatives
- draft framework decision European arrest warrant

- Protocol to TEU on ‘internal’ asylum
 - MS constitute ‘safe countries of origin’ per se
 - internal applications presumed manifestly unfounded
 - background: Belgo-Spanish ETA-case (Morena-Garcia)
- unilateral Belgian counter-declaration
 - ‘safe country of origin’ principle accepted
 - ‘manifestly unfounded’ principle rejected
 - continued individual examination of asylum request in line with Geneva Convention obligations
 - question: can MS agree to rule out individual state responsibility under Geneva Convention?

- 1999 Tampere European Council
 - future cornerstone of judicial co-operation: mutual recognition of judicial decisions (in criminal matters)
 - November 2000 mutual recognition implementation plan
 - ‘single legal area for extradition’
 - based on mutual recognition arrest warrants and sanctions involving deprivation of liberty
 - simple surrender instead of extradition procedure
 - only a possible long-term option (2010)

- Spanish bilateral initiatives
 - several bilateral (pre-)treaties implementing a ‘surrender’ system and replacing extradition
 - rather aggressive policy (anti-ETA-terrorism)
 - aimed at gradual building up of support for a ‘closer co-operation’ (Articles 43-45 TEU) surrender framework
 - to be tabled during Spanish Presidency
 - 11 September WTC attack
 - global call for war against terrorism
 - speedened up EU decision-making process

- draft FD European arrest warrant and surrender procedures between EU MS
 - political offence exception generally abolished
 - not only in case of (criminal organisation or association to commit offences aimed at) terrorist offences (as in 1996 EU extradition Convention)
 - non-discrimination exception formally abolished
 - infringing upon individual MS responsibility Geneva Convention
 - quid enlargement & human rights issues
 - initial reference (pre-amble) to provisions EU Charter of Fundamental Rights relating to non-discrimination and right to asylum removed

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Conclusion: Enhanced security ...

- ... at the expense of freedom and justice?
 - ad hoc stepping up repression
 - without proper gap analysis
 - instead of relying on existing possibilities
 - added value unclear
 - high risk of disproportionate measures and restrictions of civil liberties (indefinite pre-trial detention UK)
 - lack of respect for fundamentals TEU & HR Charter
 - radical abolishment essential safeguards against discriminatory prosecution and internal human rights infringements

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